MOTION FILED
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No. 93-377

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

(Additional Action Listed Inside Front Cover)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

On behalf of: Seneca Nation of Indians; Mohawk Tribal Council; Iroquois Business Association; Honor Indian Treaties; Seneca Coalition Against Taxes

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JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

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Pursuant to Rule 37.4 of the Supreme Court Rules, the Seneca Nation of Indians by this Motion seeks permission to file one *amicus curiae* brief in opposition to the petition for certiorari in this case. The respondent is a federally licensed Indian Trader who trades with Seneca Nation of Indian retailers. The moving *amici* parties are the Seneca Nation of Indians, the Mohawk Tribal Council, the Honor Indian Treaties Committee, Iroquois Business Association, and the Seneca Coalition Against Taxes.

These parties appeared in the Court below as *amici curiae* and attempted to obtain the consent of the parties to appear before this Court as provided for in Rule 37.2. The attorneys for the respondents, Milhelm Attea and Brothers and Elias H. Attea, Jr., Inc., both have consented. However, the attorney on behalf of the petitioners, Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner, has refused to consent.

Specifically, Mr. Millenbach, who appeared on behalf of the petitioner in the New York Court of Appeals, advised that the State would consent to the filing of an *amicus* brief, **but only if that brief did not discuss the Seneca and Six Nations treaties or New York statutes that prohibit taxation within the reservations of New York.**

This Motion is being made so that the Court can have all the relevant law before it, which is the function of an *amicus* brief, as specified in Rule 37.1. When this case was argued before the New York State Court of Appeals, that court granted an order permitting the moving parties herein to file one *amicus* brief on behalf of the *amici* parties.

After receiving the *amici* brief in this matter and at the request of the *amici* parties, the New York Court of Appeals also granted the unusual relief of permitting oral argument by the *amici* parties.

It is respectfully submitted that the petitioner's attempt to determine what is relevant or to limit what arguments are made by the Seneca Nation of Indians should be rejected, as it would deprive this Court of the opportunity to review the same points of law and material that were presented to the court below.

Pursuant to Rule 37.4, the moving parties herein submit that they have a more overriding interest in the outcome of this case than either of the parties. The Seneca Nation of Indians, a federally recognized Indian tribe, is one of the Six Nations, [also known as the Iroquois Confederacy] and as such possesses Sovereign rights under the earliest treaties ever negotiated by the United States government, guaranteeing peaceful enjoyment of their land, free of disturbances. Additionally and most significantly, the Senecas were guaranteed freedom from State and local taxes on their reservations in The 1842 Compromise Treaty with the Senecas at the Buffalo Creek Reservation.

Because its treaty rights were negotiated at such an early date in our Nation's history, the Seneca Nation enjoys a unique historical posture which differentiates them from other tribes. Unlike the western tribes, which were defeated in battle, relinquished their claim of ownership, and were often relocated, the Seneca Nation of Indians was never defeated, nor ever relocated. The New York State Senate in 1857 describe the Seneca's title to their lands as "absolute, original and exclusive".

The unique posture of the Seneca Nation of Indians unlike that of the tribes discussed in the cases [Moe, Colville, Potawatomi] relied on by the petitioner, has resulted in a rich body of New York State law reflecting and recognizing the unique, sovereign status of the Seneca Nation. These state laws include a New York statute prohibiting the petitioner from applying any of its tax laws within the reservation. The actions of the

petitioner threaten to destroy the security from state interference that the Senecas have enjoyed since New York adopted a law in 1857, prohibiting tax collection on the Seneca reservations.

Additionally, the State of New York expressly asked Congress repeatedly for a grant of general authority to apply its civil laws on New York reservations. These requests have been repeatedly denied, and although criminal jurisdiction was granted in 1948, Congress expressly proclaimed in 1950 that the State of New York lacked power to apply its tax laws within the reservations. Again, the petitioner's actions threaten these well settled rights of the Senecas, which they have achieved and maintained for over 200 years.

More importantly, in the only New York Indian case ever before this Court involving the question of taxation, this Court, over 100 years ago, held that the treaties prohibit New York State from attempting to apply any of its tax laws on the reservations. This court wrote that it examined the treaty language and could come to only one conclusion—that the Nation does not hold title to its land through the United States but holds it in its original claim of ownership, and that the State of New York, therefore, may not impose any of its laws, including its tax laws within the reservation.

Only Congress, which was granted exclusive plenary power to deal with Indian affairs, has the power to alter this result and Congress has expressly spoken to the subject and affirmatively denied New York taxing power within the confines of the Nation's property.

It is respectfully submitted that the arguments raised herein are significant and dispositive of the issues in this case. The New York Court of Appeals felt these arguments were significant enough to warrant granting *amicus curiae* relief, and indeed felt these arguments were so significant as to grant the unusual relief of permitting oral argument to the *amici* parties.

The Court's attention is further directed to a subsequent case commenced by the petitioner Department of Taxation which is currently pending in the New York State courts. *Snyder v. Wetzler*, Index No. 946-92. The *Snyder* case was, in the petitioner's own words, a "test case" and directly at issue in that case is the power of the State of New York to impose its taxing regulations within the Seneca Nation lands. The moving parties herein have also appeared in that case as *amici curiae*.

Finally, in support of this motion, the Court's attention is drawn to Rule 37.5, which provides that consent to the filing of an *amicus curiae* brief is not necessary when the brief is submitted on behalf of an agency of the United States, a state, territory, commonwealth, or political subdivision. Although Rule 37.5 does not expressly refer to an Indian Nation, there is substantial precedent in federal law for not only recognizing the sovereign status of the Indian Nations but also regarding them for many purposes as equivalent to a state.

In this matter the Seneca Nation of Indians has an overwhelming interest in the outcome of this litigation, as the integrity of the Nation's treaties, federal statutes applicable only to tribes in New York as well as the economic survival of the Nation itself are all at stake.

Because the Seneca Nation has such an overriding interest in the outcome of this case and is uniquely able to bring relevant matters to the court's attention, permission to file the attached *amici curiae* brief is respectfully requested of the Court.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*

On behalf of: Seneca Nation of Indians; Mohawk Tribal Council; Iroquois Business Association; Honor Indian Treaties; Seneca Coalition Against Taxes

QUESTION PRESENTED

Is the State of New York Department of Taxation preempted by Treaty, Federal, or State Laws from applying State Tax regulations taxing the conduct of commerce on a Seneca Reservation?

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STATEMENT OF INTEREST

The Seneca Nation of Indians is a federally recognized sovereign Indian Nation. It is one of the Six Nations (Seneca, Mohawk, Onondaga, Oneida, Cayuga, Tuscarora), also known as the Iroquois Confederacy. The Senecas enjoy a unique position in early American Indian history. Unlike many Western Tribes who were defeated in battle and surrendered their claim of ownership to the United States and who were often forced to relocate, the Senecas were never conquered or forced to surrender. The Seneca Nation never relocated from their aboriginal lands. Treaties acknowledge the Sovereignty of the Seneca Nation and their right to the free use and enjoyment of their land, not to be disturbed by the United States or New York State. For example, the 1789 Treaty at Fort Harmar provides that the U.S. "relinquishes" all claim to the Seneca's land "and each and every part thereof". The Senecas 1842 Compromise Treaty contains an express covenant that the taxing power of New York will never be imposed on their reservations "for any purpose".

If the New York Tax Commissioner's position prevailed, the Seneca Nation Members and the other *amici* parties would suffer irreparable harm. Heretofore their treaties, federal and state statutes have protected them from such injury. The Seneca Nation and the Mohawk tribe possess Sovereign rights which New York is attempting to obliterate without any congressional authority.

The tax regulations in the instant case represent an attempt by the State of New York to circumvent the express promises made by the United States and the State of New York in these treaties to the Senecas. This *Amici* Brief is submitted to call to the Court's attention the Federal and State statutes and decisional law, including Supreme Court cases, that developed as a result of the sacred promises made by the United States and the State of New York to the Senecas.

SUMMARY OF ARGUMENT

In 1784, the fledgling United States Government elected to buy its peace with the Six Nations of the Iroquois Confederacy.[1]

The foremost author on Indian Affairs, Felix Cohen, devoted an entire chapter of his Treatise to the unique status of the "New York Indians". Felix Cohen, Handbook of Federal Indian Law, Chapter V, (Univ. of N. Mex. Press, 1972). Unlike tribes that were defeated in battle and relocated, the Six Nation Indians were never defeated, the Senecas were not relocated and their title is "original, absolute and exclusive" and does not derive from the United States, nor New York State. See New York Senate Doc. No. 28 (1857).

The unique status of the Seneca Nation was recognized by New York's own State Legislature, which has prohibited taxation of the reservations since 1857. 1857 N.Y. Laws Ch. 45, §4; New York Indian Law, §6 (McKinney 1950).

Congress as well, which has the exclusive power under the Constitution to regulate Indian affairs, has recognized the Six Nations as unique. Despite repeated requests, Congress has refused to delegate to New York the power to apply its civil laws on the reservations, see 25 U.S.C. §§232 & 233, and has refused to make the reservations in New York subject to allotment. Dawes Act, 24 Stat. 388 (1887).

[1] The Treaties between the parties are set forth in an appendix to this Brief and include the following: Fort Stanwix Treaty, Oct. 22, 1784, U.S.—Six Nations, 7 Stat. 15; Fort Harmar Treaty, Jan. 9, 1789, U.S.—Six Nations, 7 Stat. 38; Canandaigua Treaty of Peace, Nov. 11, 1794, U.S.—Six Nations, 7 Stat. 44; Buffalo Creek Compromise Treaty, May 20, 1842, U.S.—N.Y.—Mass.—Seneca Nation.

Most importantly, in the only New York Indian tax case to reach the United States Supreme Court, this Court expressly held that the treaties with the Seneca Nation allow only one interpretation—namely that the treaties prohibit the State of New York from attempting to apply any of its laws, including tax laws, within the reservation. The *New York Indians*, 72 U.S. 761 (1866).

This Court has consistently and repeatedly held that State intrusions onto Indian property must be measured against the specific treaties and statutes that govern the parties. *McClanahan v. Arizona State Tax Commission*, 411 US 164 (1973). This preemption analysis has recently been reaffirmed in *Oklahoma Tax Commission v. Sac and Fox Nation*, No. 92-259 (S.Ct., May 17, 1993).

Despite two hundred years of history, which includes treaties, a State law, an Act of Congress, and a decision from this Court, all prohibiting taxation on the reservation, the New York Tax Commissioner on his own motion has forged ahead without any federal or state legislative authority and elected to apply a tax on a commercial reservation transaction. This was done even though the New York State Legislature in 1992 and 1993 refused to pass a bill that would have authorized the Commissioner's unilateral conduct. New York Senate Bill S7988B.

In light of these overwhelming facts, it is clear that the New York State Court of Appeals correctly found the conduct of this state agency preempted by federal law, and the application for a writ of certiorari should be denied.

ARGUMENT

The Writ Of Certiorari Should Be Denied Because The Court Of Appeals' Decision Is Consistent With The Federal Treaties And Statutes Governing New York.

The petitioner's sole argument for granting certiorari in this case is that the holding of the New York Court of Appeals is in conflict with this Court's decisions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Oklahoma Tax Commission v. Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991) (hereinafter *Moe, Colville, and Potawatomi*). As set forth in the Respondent's brief this proposition is untenable.[2]

Irrespective, however, of what *Moe, Colville & Potawatomi* imply or declare concerning the specific treaties and statutes at issue in those cases, New York is preempted from imposing its taxing or regulatory authority on the transactions at issue under specific treaties, federal statutes, state statutes, and an 1866 decision of this Court—*The New York Indians*, 72 U.S. 761—all uniquely applicable to New York and New York Indians. These relevant sources of State and Federal law make it abundantly clear that New York has no power or authority to regulate these transactions on the reservations. Thus, independently of the Indian Trader

[2] The New York Court of Appeals put this point beyond doubt by finding that the tax scheme imposed "significant" as opposed to "minimal" burdens on the wholesalers and imposed a tax directly on the retailers.

State Court characterizations of state law are accepted as binding by this court. *Knights of Pythias v. Meyer*, 265 U.S. 30, 32 (1924). Stern, Gressman, and Shapiro, Supreme Court Practice, 185 (6th ed. 1986). Cf. *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

As stated by this Court: "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443 (1940).

statutes or cases from other jurisdictions, the Court of Appeals correctly found petitioner's regulations preempted. Consequently, certiorari should be denied.

The preemption doctrine is one of the oldest and most fundamental doctrines of this Court. In 1803 this Court held, in *Marbury v. Madison*, 5 U.S. 137 (1803), that any law that conflicts with the "Supreme Law of the Land" is null and void.

The United States Constitution provides that all treaties made by the United States shall be "the supreme Law of the Land"—the "Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. State action in violation of the Treaties is null and void. See *Fellows v. Denniston*, 23 N.Y. 420, 427 (1861). As noted by Professor Tribe, in his treatise:

> "Under the supremacy clause, it is indisputable that a valid treaty overrides any conflicting state law, even on matters otherwise within state control." Lawrence Tribe, American Constitutional Law [2d ed] p. 226.

Professor Tribe cites as authority several cases, including New York's very own "The New York Indians" (72 U.S. 761).[3]

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) this Court applied the preemption doctrine to Indian Law issues. This Court articulated that State intrusions on Indian Sovereignty must be measured by examining the language of the "applicable treaties and statutes which define the limits of State power",

[3] Professor Tribe also points out that treaties are equal in force with congressional acts. Accordingly, where a congressional act and a treaty have conflicting provisions, the one later in time prevails (Tribe, *Id.*, at pg. 226).

This rule is consistent with and buttresses a corollary principle: that only Congress has the power to regulate Indian affairs and only Congress can delegate power to the states, which are powerless to act in the absence of congressional authorization.

McClanahan, at 172; *Oklahoma Tax Commission v. Sac & Fox Nation*, No. 92-259 (S.Ct., May 17, 1993); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1986); see also *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) ["the dominant trend of our cases is toward treating the scope of reservation immunity from non-discriminatory taxation as a question of preemption"].

Moreover, in applying the *McClanahan* analysis, this Court has mandated that the language of Indian treaties and statutes applicable to Indians must be construed according to the following rules:

> [1] **Ambiguous expressions must be resolved in favor of the Indian parties.** *McClanahan v. State Tax Commissioner*, 411 U.S. 164, 174 (1973); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1912); *Winters v. U.S.*, 207 U.S. 564, 576-77 (1908).
>
> [2] **Language must be interpreted as the Indians would have understood them.** *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *Jones v. Meehan*, 175 U.S. 1 (1895); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832);
>
> [3] **Language must be liberally construed in favor of the Indians.** *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Tulee v. Washington*, 315 U.S. 681, 685-85 (1942).
>
> [4] **"[T]ax exemptions secured to the Indians by agreement between them and the national government are to be liberally construed in favor of the Indians."** *Carpenter v. Shaw*, 280 U.S. 363, 367.

In accordance with *McClanahan* and the above cited cases, the preemption issue in the present case can only be resolved by examining the relevant treaties and statutes applicable to the parties in this case.

A. The tax regulations are invalid because they violate the letter and spirit of specific and unique Seneca Nation Treaties, which are the Supreme Law of the Land.

The treaties governing the Senecas and the Six Nations Indians, which are set forth in full in the *Amicus'* Appendix, prohibit the State of New York from applying its laws, particularly its tax laws, on Reservations. As stated by the pre-eminent authority on American Indian law, Felix Cohen, in a special chapter of his treatise devoted solely to the "New York Indians":

> "These several treaties guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and **had the effect of placing the tribes and their Reservations beyond the operation and effect of general state laws.**"

Felix Cohen, Handbook of Federal Indian Law, pp. 418-419 (Univ. of N. Mex. Press, 1972), (emphasis added). The treaties referred to by Professor Cohen include the following:

FORT STANWIX TREATY (1784), 7 Stat. 15

This very first treaty entered into between the Six Nations and the United States illustrates that the parties regarded each other as sovereigns who were both claiming a right to possess the same land. In this first treaty the parties agreed to divide up the lands and thereafter live in peace.

Article III fixes the boundary line between the two parties and provides that "the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary and then they shall be secured in the peaceful possession of the lands they inhabit east and north of same. . . ."

FORT HARMAR TREATY (1789), 7 Stat. 38.

Five years later the parties executed a second treaty, which further defined boundaries and provided that "the said boundary line" shall "remain as a division line

between the lands of the said Six Nations and the territory of the United States, **forever**". The United States agreed to "relinquish" all claims to the Indians' land "and every part thereof".

CANANDAIGUA TREATY OF PEACE (1794), 7 Stat. 44.

This treaty between the United States and the Six Nations, held at Canandaigua, Nov. 11, 1794, recites that it is made for the purpose of removing from the Six Nations' mind "all causes of complaint and establishing a firm and **permanent** friendship". The United States acknowledges the boundaries of the lands belonging to the members of the Six Nations. In Article III the United States expressly promised:

> "Now the United States acknowledge all the lands within the aforementioned boundaries to be the property of the Seneca Nation; **and the United States will never claim the same, nor disturb the Senecas in the free use and enjoyment thereof;** ***but it shall remain theirs until they choose to sell the same to the people of the United States who have the right to purchase.***" 7 Stat. 44, Article III.

1842 COMPROMISE TREATY WITH THE SENECA NATION BUFFALO CREEK RESERVATION, 7 Stat. 586.

In addition, and most importantly, there is the Buffalo Creek Compromise Treaty of 1842 to which the State of New York, Massachusetts, the United States and the Seneca Nation were parties. Explicit language in this treaty prohibits New York State from taxing Seneca Nation Indian Reservation activities:

> **"Art. 9. The parties to this compact mutually agree to solicit the influence of the United States to protect such of the lands of the Senecas within the State of New York as may from time to time remain in their possession from all taxes, and assessments for roads, highways and other purposes until such lands shall be sold and conveyed by said Indians and possession thereof shall be relinquished by them." 7 Stat. 586.**

This treaty was later codified by the New York Legislature and revised to provide that no taxes would be imposed on any reservations within the state. See New York Indian Law §6 (McKinney, 1950).

The treaties applicable to the New York Indians are markedly different from the treaties applicable to the western tribes. The petitioner relies heavily on cases which are based on treaties governing only the western tribes. The chief difference is that the western tribes, who were all defeated in battle, were forced to relinquish title to their lands. In exchange they were allowed the "use" of land owned by the United States, often requiring the tribes to relocate.

Moe Treaties

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), for example, the treaty with the Flatheads provided "The Flathead Nation hereby **cede, relinquish and convey** to the U.S. all their right, title and interest in the country occupied and claimed by them within the described boundaries. . . ." Treaty with the Flatheads, July 16, 1855, U.S.—Flathead Nation, 12 Stat. 975. The treaty went on to provide that the tract of the land "above ceded" would be reserved for the "use and occupation" of the tribe. Treaty with the Flatheads, July 16, 1855, U.S.—Flathead Nation, 12 Stat. 975.

This treaty gave the Flatheads vastly limited rights compared to what the Senecas enjoy. Noticeably absent from the Flathead Treaty is the specific language found in the Seneca Treaty of 1789, where the U.S. agreed to "confirm the said boundary line" of the earlier treaty "to the end that it may be and remain **as a division line** between the lands of the said Six Nations and the

territory of the U.S., **forever**" Fort Harmar Treaty, 7 Stat. 38 (emphasis added). The *Moe* treaty did not contemplate any similar jurisdictional division between the Flatheads and the United States.

To the contrary, the Flathead Treaty placed the reservation land under the ownership of the U.S. and made it **subject to allotment at the discretion of the President**. Treaty with the Flatheads, 12 Stat. 975. The Senecas were never made subject to the Allotment Act of 1887, a reflection of their unique status. Also, significantly absent from the *Moe* treaty is any language similar to the promises made in the 1794 Treaty with the Senecas, wherein the "U.S. acknowledged that all land within the reservation boundaries was the **property** of the Seneca Nation" and promised that the "United States will never claim the same **nor disturb the Seneca Nation in the free use and enjoyment thereof**". Treaty at Canandaigua, 7 Stat. 44. The Flathead Treaty does not contain any such explicit agreement prohibiting future interference or disturbance in the use of their own tribally held property.

Finally, perhaps the most significant difference is the obvious absence from the Flathead treaty of any language prohibiting state taxation on or within their reservation. In the Flathead treaty there is no language or provision similar to Article 9 of the 1842 Seneca Treaty in which the United States and the State of New York promised "to protect such lands from all taxes and assessments". Buffalo Creek Treaty, 7 Stat. 586.

Colville Treaties

The Treaties at issue in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, and specifically referred to by the Court, are the following: (1) Treaty of Point Elliot, Jan. 22, 1855, U.S.—Dwámish and Suquámish Indians, 12 Stat. 939; (2) Treaty with the Makah Tribe, Jan. 31, 1855,

U.S.—Makah, 12 Stat. 939; (3) Treaty with the Yakamas, June 9, 1855, U.S.—Yakama Nation, 12 Stat. 951.

These treaties are quite similar to the Flathead Treaty in *Moe*. The Treaties with the Dwámish Indians and the Yakamas both generally provide that these tribes cede their claims of ownership to the United States and that specified tracts of land are reserved "for the use and occupation" of the tribes.

The treaty with the Makah tribe similarly provides "that a tract of land is reserved **for the present use and occupation**" of the tribe. The Makah Treaty also made the tribe subject to **involuntary removal** from such reservation at anytime. Treaty with the Makah Tribe, 12 Stat. 939 (1855) (emphasis added).

All three of the Treaties with the Dwámish, Makah, and Yakamas made the reserved land subject to Allotment at the "discretion" of the President. Treaty at Point Elliot, 12 Stat. 939 (1855). Significantly, once again the treaties cited in *Colville* contain no specific provision prohibiting "any taxes or assessments" on such reservations, as does the 1842 Treaty with the Seneca Nation. 7 Stat. 586. Such preemptive language is noticeably absent from all treaties relied on in *Colville*.

The Seneca treaties recognize the Senecas as a sovereign Nation with a perpetual right to the undisturbed use and enjoyment of the land within their borders. The Senecas are not subject to removal, allotment, or taxation as are the western tribes in the cases relied on by the petitioner. To the contrary, the United States expressly agreed to "relinquish" all claims to the Seneca's land "and every part thereof." Fort Harmar Treaty, 7 Stat. 38. The legal position of the Seneca Nation is completely opposite from the Colville tribes, and thus under *McClanahan*, *Colville* does not provide precedent by which to fairly assess the law governing transactions on the Seneca Reservations.

Potawatomi Treaties

The Potawatomi have even less autonomy than the Colville and Flathead tribes. The District Court in the *Potawatomi* opinion (W.D. Oklahoma, F.D.C., CIV-87-0338-W) describes the tragic history of the tribe's removal from the Great Lakes to Kansas and then to Oklahoma. The court also related their allotment and receipt of new land conveyed to them by the federal government. Notably, the land at issue in *Potawatomi* was conveyed to the Citizen Band by virtue of legislation and a quit claim deed, both expressly providing that "these tracts were **not exempt from taxation** or restriction on use, management or disposition because of Indian ownership." See *Oklahoma Tax Comm. v. Potawatomi, supra;* see also *State of Oklahoma, County of Pottowautomie,* Book 281, Quitclaim Deeds, p. 28.

As in *Moe* and *Colville,* treaties with the Potawatomis are significantly different from the relevant treaties made with the Seneca Nation. Treaty with the Pottowautomie Nation, June 5 & 17, 1846, U.S.—Pottowautomies, 9 Stat. 853 (1846); Treaty with the Pottawatomies, Nov. 15, 1861, U.S.—Pottawatomie tribe, 12 Stat. 1191; Treaty with the Pottawatomie Indians, Feb. 27, 1967, U.S.—Pottawatomie Tribe, 15 Stat. 531. The Senecas never relinquished title to their land. They were never relocated like the Potawatomis. Their title to the Cattaraugus and Allegheny reservations is ***"original" "absolute"*** and ***"exclusive".*** New York Sen. Doc. 28, 1857. As noted above, the Senecas are not subject to allotment. However, the most direct contrast between the two situations is that the Potawatomi lands were specifically declared by Congress as "not exempt from taxation". 74 Stat. 903; 78 Stat. 392, whereas the 1842 Treaty with the Senecas declared their reservation land free "from all taxes and assessments". This tax exempt language is also found in 25 U.S.C. 233 ("Provided further, that nothing in this section shall be construed as subjecting the lands within

Indian Reservation in the State of New York to Taxation for state or local purposes.") and New York Indian Law, §6 ("no taxation for any purpose whatsoever.").

B. The New York Legislature recognized the unique effect of the Seneca Treaties by declaring the reservations wholly exempt from taxation in Indian Law Section 6.

In the 1842 Buffalo Creek Compromise Treaty with the Senecas, the United States and the State of New York, who were both parties, expressly promised in Article 9 to protect the lands of the Senecas "from all taxes" until such lands are conveyed by the Senecas and possession relinquished by them.

In 1841 New York attempted to apply its tax laws within the Seneca Nation reservations. In light of the 1842 Seneca Treaty, a New York State Senate Committee in 1857 reviewed the treaties and concluded as follows:

> **"From a careful examination of the several treaties heretofore made with the Senecas . . . your committee are clearly of the opinion, that the Senecas do not hold the title to the Cattaraugus and Allegheny reservations under the State of New York, nor under the United States, but their title to same is original, absolute and exclusive" New York Senate Doc. No. 28 (1857) (Emphasis added).**

The New York Senate Judiciary Report adopted by the Senate went on to conclude that the State of New York, as a party to the treaty, "is also bound not to impose taxes on said reservations" *Id.*

Based on the Senate Judiciary Report, the New York State Legislature enacted in 1857 a state law expressly prohibiting taxes:

> **"No tax shall hereafter be assessed or imposed on either of said reservations, or on any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca**

> **Nation; and all acts of the legislature of this state conflicting with the provisions of this section, are hereby repealed." 1857 New York Laws Ch. 45, §4.**

Since that time the State of New York Legislature has continually reaffirmed the public policy of tax exemption on Indian reservations. In 1892, this status was codified as part of the state's general Laws in Chapter V, Article I, Sec. 6 incorporating the same text as the 1857 statute. In 1907, the statute was revised and became part of the Consolidated Laws in Chapter 5, Article 2, Sec. 6. The language of the statute was broadened to generally exempt **all reservations** in New York from state taxation, in addition to the Seneca reservations. The new Sec. 6 was entitled **Exemption of reservation lands from taxation** and stated:

> **"No taxes shall be assessed for <u>any purpose whatever,</u> upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same". 1909 New York Laws, Ch. 31, Article 2.**

Today, that provision is known as Indian Law Sec. 6 and thus this statute **presently acknowledges** and confirms that the "Treaties made with the Senecas have the effect of precluding any state taxation, **"for any purpose whatever"**, on the Indian reservations within the State of New York. New York Senate Doc. 28 (1857).

C. The uniqueness of the Seneca Treaties was conclusively established by the United States Supreme Court in 1866 in the *New York Indians* case, which held that New York may not apply its laws within Seneca borders for any purpose.

Shortly after the New York Senate had performed its own analysis of the treaties and the State Legislature had adopted what is now Indian Law §6, banning all State taxes within the reservation, the issue was raised in the United States Supreme Court. In *The New York Indians,* 72 U.S. 761, this Court declared invalid the 1841 statute which authorized the construction of roads

and bridges on the reservations and which also provided for tax assessments to pay for them. Even though the statute barred the State from entering the reservation for the purpose of collecting the tax, this Court invalidated the law and declared the reservations wholly exempt from not only state taxation but also from State action building roads within Reservation borders.

This Court examined the treaties and came to the same conclusion as did the New York Senate four years earlier—that the State of New York has no power whatsoever over the Reservations.

> "[T]he rights of the Indians do not depend on this or any other statutes of the State but upon treaties which are the supreme law of the land; it is to these treaties we must look to ascertain the nature of these rights, and the extent of them. . . .
>
> "These treaties are historical . . . beginning in 1784 and coming down to 1842. That of 1794, entered into at Canandaigua, New York, may be cited as a specimen. Third Article, 'The United States acknowledge all the land within the aforementioned boundaries . . . to be the property of the Seneca Nation, and the United States **will never claim the same nor disturb the Seneca Nation, . . . in the free use and enjoyment thereof**; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase. . . .
>
> "These are the guarantees given by the United States, and which her faith is pledged to uphold. Now we have seen that this law, [the 1841 NY Statute] taxing the lands in the reservations, authorizes the county authorities to enter upon them, survey and lay out roads, construct and repair them, construct and repair bridges, assess and collect taxes to meet the expenses, and survey the lands for the purpose of making the assessments,

and in pursuance of these powers the proper officers of the counties have assessed upon them large sums for the years 1840, 1841, 1842, and 1843.

"The answer to all this interference with the possession and occupation, and exercise of authority is, that the sale of the lands in default of payment of the taxes shall not "affect the right of occupancy of the Indians." We are of opinion that this is not a satisfactory answer.

"We have looked through all the treaties from 1784 down to the present time. . . .

"Until the Indians have sold their lands, . . . they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them.

"**We must say . . . these reservations [are] wholly exempt from State taxation, . . . and the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations**" *The New York Indians,* **72 U.S. at 766-771 (emphasis added).**

What is important to note about this holding of the Supreme Court invalidating the 1841 statute, is that it was based on the Treaty language of 1794, 7 Stat. 44, which recognized the "ancient possession" of the Indians of New York and guaranteed their "undisturbed enjoyment". Such language, held this Court, not only rendered the reservations "wholly exempt from State taxation" but prohibited the state from entering for the purpose of constructing roads and bridges. Indeed, *The New York Indians* case was later described by this Court as one "where the State sought to raise money by taxes to build roads in Indian Reservations and where existing treaties forbade the State's building such roads" *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 602 (1943).

The point is that what the treaties forbade, **and forbid,** is the interference with the possessory right of the Indians to use the reservation land as they see fit. Building roads without approval on the reservations interfered with this possessory right; taxing the land to finance this construction interfered with such possessory right; and what the Department of Taxation and Finance has done here interferes with the basic possessory right of the Seneca to conduct trade without the interference and intrusion of the State of New York.

D. Congress reaffirmed the unique effect of the Seneca Treaties when, in enacting 25 U.S.C. §233, it refused to grant New York the power to extend its civil laws to the reservations and further expressly prohibited state taxation on such reservations.

The United States Constitution grants to Congress the exclusive, plenary power to regulate Indian affairs (United States Constitution, Art. I, §8, cl.3). The founding fathers recognized the need to protect the tribes from encroachment by state governments. This philosophy is reflected in the Indian Trader statutes, which, in accord with the United States Constitution, have completely preempted the field and prohibit state governments from encroaching into reservation matters. *Warren Trading Post Co. v. Arizona Tax Comm.,* 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona Tax Comm.,* 448 U.S. 160 (1980). Only Congress, therefore, can regulate trade occurring on the reservations. Absent an express delegation of power from Congress, the state may not regulate reservation affairs. *Montana v. Blackfeet,* 171 U.S. 759, 765 (1985), *County of Yakima v. Yakima Nation,* _____ U.S. _____, 112 S. Ct. 683 (1992).

Congress did delegate in 1948 to New York State the power to apply its criminal laws on the reservations (25 U.S.C. 232). Congress was asked, and expressly refused, however, to allow New York to apply its civil laws on the reservations.

This fact was admitted by Tax Commissioner Wetzler, one of the petitioners herein, in a statement made last year to the New York State Senate Committee, which was considering a bill that would make New York's tax laws applicable to the reservations. Commissioner Wetzler candidly admitted:

> "Despite the fact that New York once sought a specific Congressional delegation of general civil authority over Indians and Indian reservations, Congress has not given New York such authority. New York's general civil laws—including its tax laws—are not, therefore, automatically applicable to tribe members on reservations."[4]

This statement of New York's Tax Commissioner succinctly summarizes the attempts by New York to extend its civil control over the reservations. Throughout much of the early 1900's, efforts were made by leaders in New York to assimilate the New York Indians and abolish their Sovereign status. Legislative documents in New York, such as the Whipple Report illustrate the thinking at that time, which was "that the best that could be done for the Indian would be 'exterminate the tribe and preserve the individual; make citizens of them and divide their lands in severalty'" Lawrence Hauptman, Formulating American Indian Policy in New York State, 1970-1986, quoting the Whipple Report, New York State Assembly Document No. 51 (1888).

[4] The footnote to the statement provided: "The purported grant of civil jurisdiction contained in 25 USC 233 is virtually identical to that of another federal statute (28 USC 1360), which the U.S. Supreme Court ruled in Bryan v. Itasca County, (426 U.S. 313 (1976)) was not a general grant of authority over Indians and reservations, but only opened up state courts to tribe members."

In furtherance of this plan, Congress was asked to pass a law that would divide in severalty the lands of the Six Nations. HR 18735, 63rd Cong. 3d Sess. (1915). A House document on that bill noted a second attempt was a constitutional amendment at the state level which would have extended state laws to the reservations. Gerald Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal—State Relations*, Buff. L. Rev., 1, 13 (Fall 1958). Along those same lines, in 1930 the Snell Bill was introduced into Congress. This bill would have authorized what the petitioner herein now seeks—State law would generally have applied throughout the reservation. HR 9720, 71st Congress 2nd Sess. 1930. Like earlier attempts to grant New York State civil authority over the Reservations, the Snell Bill was rejected by Congress.

Instead, in response to a Second Circuit case holding that New York Courts had no jurisdiction to hear civil cases involving Indians, *United States v. Forness*, 125 F. 2d 928 (2d Cir. 1942), Congress in 1950 enacted 25 U.S.C. §233 (1989). Section 233 did not provide that New York's civil laws would apply on the reservations but provided only that New York Courts could be used as a forum for civil disputes involving Indians. For clarity, Congress added a provision in §233 that "**nothing in this section shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or Local purposes**" 25 U.S.C. §233 (1989) (Emphasis added).

Under the Constitution New York is powerless to interfere with Indian matters unless Congress so authorizes. Congress has expressly refused to delegate to petitioner the authority they have usurped.

CONCLUSION

Under *McClanahan*, 411 U.S. 164, and its progeny, the issue of preemption must be governed by the specific treaties and federal statutes applicable to the parties. In the case of the Seneca Nation and other New York Indians, the treaties themselves expressly provide that the reservations shall be free from State laws and particularly State tax laws.

The unilateral action of the New York State Department of Taxation contradicts the laws of New York's own State Legislature and violates 200 years of history, including treaties as well as an Act of Congress (25 U.S.C. §233) and a decision from this Court (The New York Indians), both of which examined the applicable treaties and found that they prohibit applying state tax laws within the reservations.

For all these reasons the New York State Court of Appeals correctly found the petitioner's regulations preempted, and the petition for certiorari should be denied.

Respectfully submitted,

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AMICI CURIAE APPENDIX

TREATY WITH THE SIX NATIONS, 1784

Oct. 22, 1784

7 Stat., 15

Articles concluded at Fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, between Oliver Wolcott, Richard Butler, and Arthur Lee, Commissioners Plenipotentiary from the United States, in Congress assembled, on the one Part, and the Sachems and Warriors of the Six Nations, on the other.

The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:

ARTICLE I.

Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.

ARTICLE II.

The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

ARTICLE III.

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing Place, upon the lake

named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying-path, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffalo Creek on Lake Erie; thence south to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

ARTICLE IV.

The Commissioners of the United States, in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States upon the signing of the above articles, will order goods to be delivered to the said Six Nation for their use and comfort.

Oliver Wolcott, [L.S.]
Richard Butler, [L.S.]
Arthur Lee, [L.S.]

Mohawks:

Onogwendahonji, his x mark, [L.S.]
Touighnatogon, his x mark, [L.S.]

Onondagas:

Oheadarighton, his mark, [L.S.]
Kendarindgon, his x mark, [L.S.]

Senekas:

Tayagonendagighl, his x mark, [L.S.]
Tehonwaeaghrigagi, his x mark, [L.S.]

Oneidas:

Otyadonenghti, his x mark, [L.S.]
Dagaheari, his x mark, [L.S.]

Cayuga:

Oraghgoanendagen, his x mark, [L.S.]

Tuscaroras:

Ononghsawenghti, his x mark [L.S.]
Tharondawagon, his x mark, [L.S.]

Seneka Abeal:

Kayenthoghke, his x mark, [L.S.]

Witnesses:

Sam. Jo. Atlee,
Wm. Maclay,
Fras. Johnston,
Pennsylvania Commissioners.
Aaron Hill
Alexander Campbell,
Saml. Kirkland, missionary,
James Dean,
Saml. Montgomery,
Derick Lane, captain,
John Mercer, lieutenant,
William Pennington, lieutenant,
Mahlon Hord, ensign,
Hugh Peebles.

TREATY WITH THE SIX NATIONS, 1789

Jan. 9, 1789

7 Stat., 38

Articles of a treaty made at Fort Harmar, the ninth day of January, in the year of our Lord one thousand seven hundred and eighty-nine, between Arthur St. Clair, esquire, governor of the territory of the United States of America, north-west of the river Ohio, and commissioner plenipotentiary of the said United States, for removing all causes of controversy, regulating trade, and settling boundaries, between the Indian nations in the northern department and the said United States, of the one part, and the sachems and warriors of the Six Nations, of the other part:

Art. 1. WHEREAS the United States, in congress assembled, did by their commissioners, Oliver Wolcott, Richard Butler, and Arthur Lee, esquires, duly appointed for that purpose, at a treaty held with the said Six Nations, viz: with the Mohawks, Oneidas, Onondagas, Tuscaroras, Cayugas, and Senekas, at fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, give peace to the said nations, and receive them into their friendship and protection; And whereas the said nations have now agreed to and with the said Arthur St. Clair, to renew and confirm all the engagements and stipulations entered into at the before mentioned treaty at fort Stanwix; and whereas it was then and there agreed, between the United States of America and the said Six Nations, that a boundary line should be fixed between the lands of the said Six Nations and the territory of the said United States, which boundary line is as follows, vix: Beginning at the mouth of a creek, about four miles east of Niagara, called

Ononwayea, or Johnston's Landing Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly, in a direction always four miles east of ;the carrying place, between lake Erie and lake Ontario, to the mouth of Tehoseroton, or Buffalo creek, upon lake Erie; then south, to the northern boundary of the state of Pennsylvania; thence west, to ;the end of the said north boundary; thence south, along the west boundary of the said state to the river Ohio. The said line, from the mouth of Ononwayea to the Ohio, shall be the western boundary of the lands of ;the Six Nations, so that the Six Nations shall and do yield to the United States, all claim to the country west of the said boundary; and then they shall be secured in the possession of the lands they inhabit east, north, and south of the same, reserving only six miles square, round the fort of Oswego, for the support of the same. The said Six Nations, except the Mohawks, none of whom have attended at this time, for and in consideration of the peace then granted to them, the presents they then received, as well as in consideration of a quantity of goods, to the value of three thousand dollars, now delivered to them by the said Arthur St. Clair, the receipt whereof they do hereby acknowledge, do hereby renew and confirm the said boundary line in the words before mentioned, to the end that it may be and remain as a division line between the lands of the said Six Nations and the territory of the United States, forever. And the undersigned Indians, as well in their own names as in the name of their respective tribes and nations, their heirs and descendants, for the considerations before mentioned, do release, quit claim, relinquish, and cede, to ;the United States of America, all the lands west of the said boundary or division line, and between the said line and the strait, from the mouth of Ononwayea and Buffalo

Creek, for them, the said United States of America, to have and to hold the same, in true and absolute propriety, forever.

ART. 2. The United States of American confirm to the Six Nations, all the lands which they inhabit, lying east and north of the before mentioned boundary line, and relinquish and quit claim to the same and every part thereof, excepting only six miles square round the fort of Oswego, which six miles square round said fort is again reserved to the United States by these presents.

ART. 3. The Oneida and Tuscarora nations are also again secured and confirmed in the possession of their respective lands.

ART. 4. The United States of America renew and confirm the peace and friendship entered into with the Six Nations, (except the Mohawks), at the treaty before mentioned, held at fort Stanwix, declaring the same to be perpetual. And if the Mohawks shall, within six months, declare their assent to the same, they shall be considered as included.

Done at Fort Harmar, on the Muskingum, the day and year first above written.

In witness whereof, the parties have hereunto, interchangeable, set their hands and seals.

Ar. St. Clair, [L.S.]
Cageaga, or Dogs Round the Fire, [L.S.]
Sawedowa, or The Blast, [L.S.]
Kiondushowa, or Swimming Fish, [L.S.]
Oncahye, or Dancing Feather, [L.S.]
Sohaeas, or Falling Mountain, [L.S.]
Otachsaka, or Broken Tomahawk, his x mark, [L.S.]

Tekahias, or Long Tree, his x mark [L.S.]
Onecnsette, or Loaded Man, his x mark, [L.S.]
x mark, [L.S.]
Kiahtulaho, or Snake, [L.S.]
Aqueis, or Bandy Legs, [L.S.]
Kiandogewa, or Big Tree, his x mark, [L.S.]

Owenewa, or Thrown in the Water, his x mark, [L.S.]
Gyantwaia, or Cornplanter, his x mark, [L.S.]
Gyasota, or Big Cross, his x mark, [L.S.]
Kannawsee, or New Arrow, [L.S.]
Achiout, or Half Town, [L.S.]
Anachout, or The Wasp, his x mark [L.S.]
Chishekoa, or Wood Bug, his x mark, [L.S.]
Sessewa, or Big Bale of a Kettle, [L.S.]
Sclahowa, or Council Keeper, [L.S.]
Tweanias, or Broken Twig, [L.S.]
Sonachghowa, or Full Moon, [L.S.]
Cachunwasse, or Twenty Canoes, [L.S.]
Hickonquash, or Tearing Asunder, [L.S.]

In presence of-

Jos. Harmar, lieutenant-colonel commanding First U.S. Regiment and brigadier-general by brevet,
Richard Butler,
Jno. Gibson,
Will. McCurdy, captain,
Ed. Denny, ensign First U.S. Regiment,
A. Hartshorn, ensign,
Robt. Thompson, ensign, First U.S. Regiment,

TREATY WITH THE SIX NATIONS, 1794

Nov. 11, 1794

7 Stat., 44, Proclamation,
Jan. 21, 1795

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free

use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE III.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's Creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the

Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same consideration, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792;[1] making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of ;the Six Nations, and their Indian friends aforesaid.

ARTICLE VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for

[1] It appears that this treaty was never ratified by the Senate. See American State Papers, Indian Affairs, vol. 1, p. 232. Also, post 1027.

injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Timothy Pickering, [L.S.]
Onoyeahnee, his x mark, [L.S.]
Konneatorteeooh, his x mark, or Handsome Lake, [L.S.]
Tokenhyouhau, his x mark, alias Captain Key. [L.S.]
Oneshauee, his x mark, [L.S.]
Hendrick Aupaumut, [L.S.]
David Neesoonhuk, his x mark, [L.S.]
Kanatsoyh, alias Nicholas Kusik, [L.S.]
Tauhoondos, his x mark, or Open the Way, [L.S.]
Twaukewasha, his x mark, [L.S.]
Sequidongquee, his x mark, alias Little Beard, [L.S.]
Kodjeote, his x mark, or Half Town, [L.S.]
Kenjauaugus, his x mark, or Stinking Fish, [L.S.]
Soonohquaukau, his x mark, [L.S.]

Sohhonteoquent, his x mark, [L.S.]
Ooduhtsait, his x mark, [L.S.]
Konoohqung, his x mark, [L.S.]
Tossonggaulolus, his x mark, [L.S.]
John Skenendoa, his x mark, [L.S.]
Oneatorleeooh, his x mark, [L.S.]
Kussauwatau, his x mark, [L.S.]
Eyootenyootauook, his x mard, [L.S.]
Kohnyeaugong, his x mard, alias Jake Stroud, [L.S.]
Shaguiesa, his x mark, [L.S.]
Teeroos, his x mark, alias Captain Prantup, [L.S.]
Sooshaoowau, his x mark, [L.S.]
Henry Young Brant, his x mark, [L.S.]
Sonhyoowauna, his x mark, or Big Sky, [L.S.]
Onaahhah, his x mark, [L.S.]
Hotoshahenh, his x mark, [L.S.]
Kaukondanaiya, his x mark, [L.S.]
Nondiyauka, his x mark, [L.S.]
Kossishtowau, his x mark, [L.S.]
Oojaugenta, his x mark, or Fish Carrier, [L.S.]
Toheonggo, his x mark, [L.S.]
Ootaguasso, his x mark, [L.S.]
Joonondauwaonch, his x mark, [L.S.]
Kiyauhaonh, his x mark, [L.S.]
Ootaujeaugenh, his x mark, or Broken Axe, [L.S.]
Twenniyana, his x mark, [L.S.]
Jishkaaga, his x mark, or Green Grasshopper, alias Little Billy, [L.S.]
Tuggehshotta, his x mark, [L.S.]
Tehongyagauna, his x mark, [L.S.]
Tehongyoowush, his x mark, [L.S.]
Konneyoowesot, his x mark, [L.S.]
Tioohquottakauna, his x mark, or Woods on Fire, [L.S.]
Taoundaudeesh, is x mark, [L.S.]
Honayawus, his x mark, alias Farmer's Brother, [L.S.]
Soggooyawauthau, his x mark, alias Red Jacket, [L.S.]
Konyootiayoo, his x mark, [L.S.]
Sauhtakaongyees, his x mard, or Two Skies of a length, [L.S.]
Ounnashattakau, his x mark, [L.S.]
Kaungyanehquee, his x mark, [L.S.]
Sooayoowau, his x mark, [L.S.]
Kaujeagaonh, his x mark, or Heap of Dogs, [L.S.]
Soonoohshoowau, his x mark, [L.S.]
Thaoowaunias, his x mark, [L.S.]
Soonongjoowau, his x mark, [L.S.]
Kiantwhauka, his x mark, alias Cornplanter, [L.S.]
Kiantwhauka, his x mark, [L.S.]

Witnesses:

Israel Chapin.
Willian Shepard, jr.
James Smedley.
John Wickham.
Augustus Porter.
James K. Garnsey.
William Ewing.
Israel Chapin, jr.
Horatio Jones,
Joseph Smith,
Jasper Parish,
Intrpreters.
Henry Abeele.

TREATY WITH THE SENECAS

May 20, 1842

7 Stat., 586, Proclamation,
Aug. 26, 1842

Articles of a treaty made and concluded at Buffalo Creek, in the State of New York, on the twentieth day of May in the year one thousand eight hundred and forty-two, between the United States of America, acting herein by Ambrose Spencer their Commissioner, thereto duly authorized, on the one part, and the chiefs, headmen and warriors of the Seneca nation of Indians, duly assembled in council, on the other part.

Whereas a treaty was heretofore concluded, and made between the said United States, and the chiefs, headmen, and warriors of the several tribes of New York Indians, dated the fifteenth day of January in the year one thousand eight hundred and thirty-eight, which treaty having been afterwards amended, was proclaimed by the President of the United States, on the fourth of April one thousand eight hundred and forty, to have been duly ratified.

And whereas on the day of making this treaty, and bearing even date herewith, a certain indenture was made executed and concluded by and between the said Seneca nation of Indians and Thomas L. Ogden, and Joseph Fellows, assignees under the State of Massachusetts, in the presence, and with the approbation of a Commissioner appointed by the United States, and in the presence and with the approbation of Samuel Hoare, a superintendent on the part of the commonwealth of Massachusetts, which indenture is in the words and figures following to wit:

"THIS INDENTURE made and concluded between Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario of the one part, and the chiefs and headmen of the Seneca nation of Indians, on the other part at a council duly assembled and held at Buffalo Creek in the State of New York on the twentieth day of May in the year one thousand eight hundred and forty-two in the presence of Samuel Hoare, the superintendent thereto authorized and appointed by and on the part of the commonwealth of Massachusetts, and of Ambrose Spencer a Commissioner thereto duly appointed and authorized on the part of the United States.

"Whereas at a council held at Buffalo Creek on the fifteenth day of indenture of that date was made and executed by and between the parties to this agreement, whereby the chiefs and headmen of the Seneca nation of Indians for the consideration of two hundred and two thousand dollars did grant, bargain, release and confirm unto the said Thomas Ludlow Ogden and Joseph Follows, all those four several tracts of land, situate within the State of New York, then and yet occupied by the said nation, or the people thereof, severally described in eh said indenture, as the Buffalo Creek Reservation, containing by estimation forty-nine thousand nine hundred and twenty acres of land, the Cattaraugus Reservation containing by estimation twenty-one thousand six hundred and eighty acres of land, the Allegany Reservation, containing by estimation thirty thousand four hundred and sixty-nine acres of land, and eight hundred acres of land; a duplicate of which indenture was annexed to a treaty of the same date made between the United States of America and the chiefs, headmen, and warriors of the several tribes of New York Indians assembled in council; which treaty was amended

and proclaimed by the President of the United States on the fourth of April one thousand eight hundred and forty, as having been duly ratified; as by the said indenture, treaty and proclamation more fully appear.

"And whereas divers questions and differences having arisen between the chiefs and headmen of the Seneca nation of Indians or some of them, and the said Thomas Ludlow Ogden and Joseph Fellows in relation to the said indenture, and the rights of the parties thereto, and the provisions contained in the said indenture being still unexecuted, the said parties have mutually agreed to settle, compromise and finally terminate all such questions and differences on the terms and conditions hereinafter specified.

"NOW THEREFORE IT IS HEREBY MUTUALLY DECLARED, AND AGREED, BY AND BETWEEN THE SAID PARTIES AS FOLLOWS.

"ARTICLE FIRST. The said Thomas Ludlow Ogden, and Joseph Fellows in consideration of the release and agreements hereinafter contained, on the part of the said Seneca nation do on their part consent covenant and agree that they the said nation (the said indenture notwithstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of pre-emption, and all other the right and title which they then had or held in or to the said tracts of land.

"ARTICLE SECOND. The chiefs and headmen of the Seneca nation of Indians in consideration of the foregoing, and of the agreement next hereinafter contained, do on their part grant, release and confirm unto the said Thomas Ludlow Ogden, and Joseph Fellows, and the their heirs and assigns, in joint tenancy, the whole of the said two tracts of land severally called the Buffalo Creek Reservation, and the Tonnewanda Reservation, and all the right and interest therein of the said nation.

"ARTICLE THIRD. It is mutually agreed, between the parties hereto that in lieu of the sum expressed in the said indenture, as the consideration of the sale, and release of the said four tracts of land, there shall be paid to the said nation a just consideration sum, for the release of the two tracts, hereby confirmed to the said Ogden and Fellows, to be estimated and ascertained as follows.

"The present value of the Indian title to the whole of the said four tracts of land including the improvements thereon, shall for all the purposes of this present compact, be deemed and taken to be two hundred and two thousand dollars, of which sum one hundred thousand dollars shall be deemed to be the value of such title in and to all the lands within the said four tracts exclusive of the improvements thereon, and one hundred and two thousand dollars to be the value of all the improvements within the said four tracts, and of the said sum of one hundred thousand dollars the said Ogden and Fellows shall pay to the Seneca nation such proportion as the value of all the lands within the said two tracts called the Buffalo Creek, and Tonnewanda Reservations shall bear to the value of all the lands within all the said four tracts—and of the said sum of one hundred and two

thousand dollars, the said Ogden and Fellows shall pay such proportion as the value of the improvements on the same two tracts, shall bear to the value of the improvements on all the said four tracts.

"ARTICLE FOURTH. The amount of the consideration monies to be paid in pursuance of the last preceding article, shall be determined by the judgment and award of arbitrators, one of whom shall be named by the Secretary of the War Department of the United States, and one by the said Ogden and Fellows, which arbitrators in order to such judgment and award, and to the performance of the other duties hereby imposed on them, may employ suitable surveyors to explore examine and report on the value of the said lands and improvements, and also to ascertain the contents of each of the said four tracts, which contents shall govern the arbitrators as to quantity in determining the amount of the said consideration money.

"The same arbitrators shall also award and determine the amount to be paid to each individual Indian out of the sum which on the principles above stated, they shall ascertain and award to be the proportionate value of the improvements on the said two tracts called the Buffalo Creek Reservation and the Tonnewanda Reservation, and in case the said arbitrators shall disagree as to any of the matters hereby submitted to them, they may choose an umpire whose decision thereon shall be final and conclusive, and the said arbitrators shall make a report in writing of their proceedings in duplicate, such reports to be acknowledged or proved according to the laws of the State of New York, in order to their being recorded, one of such reports to be filed in the office of the Secretary of the Department of War, and the other thereof to be delivered to the said Thomas L. Ogden and Joseph Fellows.

"ARTICLE FIFTH. It is agreed, that the possession of the two parts hereby confirmed, to the said Ogden and Fellows, shall be surrendered and delivered up to them, as follows, viz: The forest or unimproved lands on the said tracts, within one month after the report of the said arbitrators shall be filed, in the office of the Department of War, and the improved lands within two years after the said report shall have been so filed: Provided always that the amount to be so ascertained and awarded, as the proportionate value of the said improvements shall on the surrender thereof be paid to the President of the United States, to be distributed among the owners of the said improvements according to the determination and award of the said arbitrators, in this behalf, and provided further that the consideration for the release and conveyance of the said lands shall at the time of the surrender thereof be paid or secured to the satisfaction of the said Secretary of the War Department, the income of which is to be paid to the said Seneca Indians annually.

"But any Indian having improvements may surrender the same, and the land occupied by him and his family at any time prior to the expiration of the said two years, upon the amount awarded to him for such improvements being paid to the President of the United States, or any agent designated by him for that purpose by the said Ogden and Fellows, which amount shall be paid over to the Indian entitled to the same, under the direction of the War Department.

"ARTICLE SIXTH. It is hereby agreed and declared to be the understanding and intent of the parties hereto, that such of the said Seneca nation, as shall remove from the State of New York, under the provisions of any treaty, made or to be made, between the United States

and the said Indians, shall be entitled in proportion to their relative numbers to the funds of the Seneca nation, and that the interest and income of such their share and proportion of the said funds, including the consideration money to be paid to the said nation in pursuance of this Indenture, and of all annuities belonging to the said Nation shall be paid to the said Indians so removing at their new homes, and whenever the said tracts called the Allegheny and the Cattaraugus Reservations, or any part thereof shall be sold and conveyed by the Indians remaining in the State of New York, the Indians so removing shall be entitled to share in the proceeds of said sales in the like proportion. And it is further agreed and declared, that such Indians owning improvements in the Cattaraugus and Alleghany tracts as may so remove from the State of New York, shall be entitled on such removal, and on surrendering their improvements to the Seneca nation, for the benefit of the nation to receive the like compensation for the same, according to their relative values, as in the third and fourth articles of this treaty are stipulated to be paid, to the owners of improvements in the Buffalo Creek and Tonnewanda Tracts, on surrendering their improvements; which compensations may be advanced by the President of the United States, out of any funds in the hands of the Government of the United States, belonging to the Seneca nation, and the value of these improvements shall be ascertained and reported by the Arbitrators, to be appointed in pursuance of the fourth article.

"ARTICLE SEVENTH. This Indenture is to be deemed to be in lieu of, and as a substitute for the above recited Indenture made and dated the fifteenth day of January, one thousand eight hundred and thirty eight, so far as the provisions of the two instruments may be inconsistent, or contradictory, and the said Indenture so

far as the same may be inconsistent with the provisions of this compact, is to be regarded and is hereby declared to be rescinded and released.

"ARTICLE EIGHT. All the expenses attending the execution of this Indenture and compact including those of the arbitration and surveys hereinbefore referred to, and also those of holding the treaty now in negotiation between the United States and the said Seneca Nation, except so far as may be provided for by the United States, shall be advanced and paid by the said Ogden and Fellows.

ARTICLE NINTH. The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes, and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

"IN WITNESS WHEREOF, the parties to these presents have hereunto, and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca Nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written."

THEREFORE taking into consideration the premises it is agreed and stipulated by and between the United States of America and the Seneca nation of Indians, as follows, to wit:

First, The United States of America consent to the several articles and stipulations contained in the last recited Indenture between the said nation, and the said Thomas Ludlow Ogden and Joseph Fellows, above set forth.

Second, The United States further consent and agree that any number of the said nation, who shall remove from the State of New York, under the provisions of the above mentioned Treaty proclaimed as aforesaid, on the fourth day of April one thousand eight hundred and forty, shall be entitled in proportion to their relative numbers to all the benefits of the said Treaty.

Third, The United States of America further consent and agree, that the tenth article of said Treaty proclaimed as aforesaid on the fourth day of April one thousand eight hundred and forty, be deemed, and considered as modified, in conformity with the provisions of the Indenture hereinabove set forth, so far as that the United States will receive and pay the sum stipulated to be paid as the consideration money of the improvements therein specified, and will receive hold and apply the sum to be paid, or the securities to be given for the lands therein mentioned, as provided for in such Indenture.

In testimony whereof the undersigned Ambrose Spencer Commissioner on the part of the United States of America, and the undersigned chiefs and headmen of the Seneca nation of Indians, have to two parts of this treaty, one thereof to remain with the United States, and the other thereof with the Seneca nation of Indians, set their hands and affixed their seals the day and year first above mentioned.

Ambrose Spencer.

Tit-ho-yah, or William Jones
Saul Lagure,
Gau-geh-gruh-doh, or George Jimison,
N.T.Strong,
Hau-neh-hoys-soh, or Blue Eyes,
Jabez Stevenson,
William Krouse,
Samuel Wilson, or Ni-ge-jos-a,
William Krouse,
Thompson S. Harris,
Sah-go-en-toh, or Morris Halftown,
Ten-wan-ne-us, or Governor Black Snake,
Doa-ne-pho-gah, or Little Johnson,
Joh-nesh-ha-dih, or James Stevenson,
Ho-wah-tan-eh-goh, or John Pierce,
Da-gon-de, or William Patterson,
Daniel Fau Guns,
Goat-hau-oh, or Billy Shanks,
Daniel Fau Guns,
Goat-hau-oh, or Billy Shanks,
James Pierce,
Gi-eut-twa=geh, or Robert Watt,
Seneca White,
Gesh-u-aw, or James Shongo,
Jarvis Spraing,
Ti-at-tah-co, or Aman Dextador,
Moris B. Pierce,
So-gooh-quas, or John Tallchief.
Isaac Halftown,
Samuel Goudon,
Tunis Halftown,
Hau-sa-nea-nes, or White Seneca,
Gah-nang-ga-eot, or Young Chief,
Thomas Jimeson,
Moses Stevenson,
Johah Armstrong,
Joseph Silverheels,
Da-o-as-sah-au, or Jo. Hunlock,
George Fox,
Yaw-sau-ge, or Peter Johnson,
Noh-sok-dah, or Jim Jonas,
Dih-no-se-du, or Jacob Shongo,
John Seneca, or Jo-on-da-goh,
Ho-no-yea-os, or Jacob Bennett,
George Turkey,
David Snow,
John Bark
George Killbuck
George Dennis,
John Kennedy, sen.,
Abram John,
Job Pierce,
Saw-da-ne, or George Deer,
Ga-na-waw, or John Cook,
Jaw-ne-es, or John Dickey,
George Big Deer,
Nah-joh-gau-eh, or Tall Peter,
John Kennedy, jr.

Signed sealed and delivered in the presence of—.

A. Dixon, Commissioner on the part of New York.
Benj. Ferris,
Orlando Allen,
Asher Wright,
O. H. Marshall,
Elam R. Jewett,
Cortland B. Stebbins,
Joseph S. Wasson.

(To the Indian names are subjoined a mark and seal.)